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In the Supreme Court of the United States

OCTOBER TERM, 1994

CEMENT KILN RECYCLING COALITION, ET AL.,
PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in light of its remand of one regulatory provision promulgated without adequate public notice, opportunity for comment, and articulated basis in the record, was required to stay application to petitioners of other regulatory provisions that the court held were properly promulgated.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 16 F.3d 1246.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1994. A petition for rehearing and suggestion for rehearing en banc was denied on April 29, 1994. Pet. App. 197a, 198a. The petition for a writ of certiorari was filed on June 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Environmental Protection Agency (EPA) promulgated regulations, pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, as amended by The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (HSWA), governing the burning of hazardous wastes as fuel. Petitioners operate wet process cement kilns that burn such wastes as fuel. They challenged the regulations as promulgated without adequate notice and comment, and as arbitrary and capricious. The court of appeals invalidated one aspect of the regulations, but upheld all others. Pet. App. 1a-49a.

1. RCRA is "a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934." *City of Chicago* v. *Environmental Defense Fund*, 114 S. Ct. 1588, 1590 (1994); see also Pet. App. 10a. Congress enacted RCRA to address the increasingly serious environmental and health dangers arising from generation, management, and disposal of hazardous waste. See H.R. Rep. No. 1491, 94th Cong., 2d Sess. 2, 3 (1976). The Act directs EPA to identify hazardous wastes, see *City of Chicago*, 114 S. Ct. at 1590; 42 U.S.C. 6921(a), and to promulgate performance standards for persons who manage hazardous wastes, including the generators and transporters of hazardous wastes and the owners and operators of facilities engaged in the treatment, storage, and disposal of hazardous wastes, 42 U.S.C. 6921-6924; see *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987).

This case involves the "treatment" of hazardous wastes under RCRA by burning them as fuel. Pet. App.

10a, 31a. EPA has authority to regulate such treatment under RCRA, and was specifically directed to do so by Congress in the HSWA. Prior to 1984, EPA regulated air emissions from the burning of hazardous wastes for disposal, but did not regulate the burning of such wastes as fuel or to recover usable materials such as metals from them.[1] EPA's decision initially not to regulate burning hazardous wastes as fuel or for materials recovery was to avoid discouraging those beneficial uses, but the absence of regulation amounted to a major regulatory loophole by means of which more than half of the hazardous wastes generated in the United States were being burned without regulation under RCRA. Pet. App. 11a. Congress viewed that result as a "major deficiency" in the RCRA regulatory program, H.R. Rep. No. 198, 98th Cong., 1st Sess. Pt. 1, at 39 (1983), and accordingly sought in the 1984 amendments to close the regulatory loophole by adding to RCRA Section 3004(q), 42 U.S.C. 6924(q). Section 3004(q)(1)(C) set a deadline for promulgation of regulations governing the burning of hazardous wastes as fuel in order "to protect human health and the environment." 42 U.S.C. 6924(q)(1)(C); Pet App. 11a.

2. Pursuant to Section 3004(q), EPA on February 21, 1991, published the Boiler and Industrial Furnace Rule (BIF Rule) at issue in this litigation. Pet. App. 8a, 10a.[2]

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[1] In 1981, EPA adopted rules to control air emissions from incinerators burning hazardous wastes for destruction. Pet. App. 11a; 46 Fed. Reg. 7666, 7678 (1981); 40 C.F.R. Pts. 264, Subpt. O, and 265, Subpt. O. At that time EPA deferred issuing rules controlling air emissions from facilities burning hazardous wastes for either energy or materials recovery. Pet. App. 11a; 45 Fed. Reg. 33,094 (1980).

[2] EPA exceeded Section 3004(q)'s two-year deadline for establishing regulations governing the burning of hazardous wastes

The BIF Rule establishes standards to control emissions from boilers and industrial furnaces (BIFs) burning hazardous wastes. 40 C.F.R. Pt. 266. The component of the BIF Rule at issue here controls products of incomplete combustion (PICs). Pet. App. 36a. PICs are incompletely burned organic compounds that are emitted from BIFs that are operating with poor combustion conditions. *Ibid.*; 56 Fed. Reg. 7149-7150 (1991). Although their health implications are not completely known, there is evidence that some PICs are carcinogenic or pose other health hazards, and EPA accordingly determined that it was prudent to regulate them. Pet. App. 37a; 56 Fed. Reg. 7150 (1991).[3]

The regulation of emission of PICs poses the problem, however, that no equipment yet exists to monitor

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as fuel, and was sued by an environmental group seeking to compel adoption of such standards. *Environmental Defense Fund* v. *Reilly*, No. 89-0598 (D.D.C.) (First Amended Complaint filed May 11, 1989). In compliance with a court-ordered deadline, the Administrator approved the final BIF Rule on December 31, 1990. The final regulations, entitled "Burning of Hazardous Waste in Boilers and Industrial Furnaces," were published in the Federal Register on February 21, 1991. 56 Fed. Reg. 7134-7240 (1991); Pet. App. 64a-108a.

EPA subsequently amended the BIF Rule by corrections and technical amendments published at 56 Fed. Reg. 32,688-32,852 (1991); technical amendments published at 56 Fed. Reg. 42,504-42,517 (1991); and technical clarification amendments and corrections published at 57 Fed. Reg. 38,558-38,566 (1992); Pet. App. 50a-63a. See Pet. App. 12a.

[3] Dioxin is one particularly toxic example of a PIC that can be formed when hazardous waste is burned, and has been detected in emissions from cement kilns burning hazardous waste. 56 Fed. Reg. 7163 & n.42 (1991).

emissions of PICs directly and continuously.[4] Based on the limited data available, EPA concluded that PIC emissions from BIFs burning hazardous wastes can be minimized if the BIFs are operated under good combustion conditions, because high combustion efficiency minimizes emission of incompletely burned organic compounds. 56 Fed. Reg. 7150 (1991); see Pet. App. 37a. EPA thus required monitoring of combustion conditions as a surrogate for direct monitoring of PICs. Specifically, low levels of carbon monoxide (CO) and total hydrocarbons (THC) emitted generally indicate that an industrial furnace is burning efficiently, and hence not emitting hazardous concentrations of products of incomplete combustion, see generally 56 Fed. Reg. 7146-7162 (1991); 52 Fed. Reg. 16,998 (1990); 40 C.F.R. 266.104, and EPA accordingly based its PIC emission standards on CO and THC levels. Pet. App. 37a

EPA adopted a three-tiered approach to the control of PICs. Pet. App. 35a-40a. BIFs burning hazardous wastes were required to meet one of the following alternative standards: *Tier I*, under which the stack or by-pass duct CO level could not exceed 100 parts per million (by volume) (ppmv), 40 C.F.R. 266.104(b); *Tier II*, under which the stack or by-pass duct CO level could exceed 100 ppmv so long as the THC level was below 20 ppmv, *id.* § 266.104(c); or *Tier III*, under which industrial furnaces lacking a by-pass duct (*i.e.* wet process kilns) could meet an alternative site-specific standard of no greater emissions of flue gas THC and CO concentrations when the kiln burns hazardous wastes than

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[4] Monitoring for the presence of certain PICs at a given time can be conducted by using special sampling and analysis techniques during trial burns, but the quantities of PICs an industrial furnace emits cannot be determined continuously over time.

when it efficiently burns non-hazardous fuel with minimum hydrocarbon emissions, *id.* § 266.104(f).

EPA selected the Tier I standard on the ground that it is readily achievable by most BIFs and is within the zone of CO values generally considered to represent good combustion conditions. 56 Fed. Reg. 7150-7151 (1991); see also 52 Fed. Reg. 16,999 (1987). It selected the alternative Tier II standard in recognition that some industrial furnaces which process raw materials containing organic matter, or use certain non-hazardous fossil fuels in addition to hazardous wastes, will emit CO at levels above 100 ppmv even when they are burning efficiently, because the oxidization of the fossil fuels or raw materials generates added CO emissions. Pet. App. 37a-39a; 56 Fed. Reg. 7153 (1991); 54 Fed. Reg. 43,723 (1989). Thus, monitoring THC levels provides an alternative means of assuring efficient combustion without imposing an unrealistically stringent CO standard.

EPA adopted Tier III in an attempt to accommodate the specific circumstances of a small number of cement kilns. Tier III "is essentially a waiver provision that allows the EPA to formulate alternative CO and THC limits on a case-by-case basis if operators of wet kilns can meet certain conditions." Pet. App. 40a. It was aimed at "6 to 10 cement plants [that] may not be able to comply with the HC limit of 20 ppmv even though they generate minimal HC from sources other than raw materials." 56 Fed. Reg. 7155 (1991); Pet. App. 40a. The cement plants' wet kilns may be unable to comply with Tier I or II because they do not have separate flues which can be monitored for fuel emissions, but combine the emissions from the raw materials with those from the fuel. Emissions from burning hazardous wastes thus cannot be measured apart from the gases emitted from

the raw materials. Pet. App. 38a-39a.[5] EPA observed that "[t]he organic compounds in normal raw materials would not normally be hazardous, so that their emissions (e.g., through volatilization) would not raise the types of concerns normally addressed by RCRA." 56 Fed. Reg. 7155 (1991). Those kilns thus might exceed the CO and THC levels set by Tiers I and II without an increase in PICs. EPA accordingly determined that the setting of site-specific baseline standards is appropriate in those limited circumstances.

3. Numerous parties, including petitioners, sought review of the February 21, 1991, final BIF Rule in the United States Court of Appeals for the District of Columbia Circuit.[6] The court consolidated all of the

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[5] EPA determined that some cement kilns had no need for the Tier III alternative because they are equipped with by-pass ducts that allow them to monitor emissions from burning hazardous-waste fuels before those emissions commingle with those from burning raw materials. 54 Fed. Reg. 43,727 (1989); 56 Fed. Reg. 7156 (1991); see Pet. App. 38a-39a. Consequently, these kilns, which include dry process kilns and some wet process kilns, are ineligible for the special alternative Tier III approach. 40 C.F.R. 266.104(f) and (g).

[6] Petitioners Lone Star Industries, Inc., Holnam, Inc., and Safety-Kleen Corporation did not timely file petitions in the court of appeals for review of the final BIF Rule and those petitioners are therefore not properly before this Court. After the time for seeking judicial review of that rule had elapsed, see 42 U.S.C. 6976(a)(1), those petitioners filed a challenge to the August 11, 1992, technical amendments to the BIF Rule. See Pet. 8 n.3. The District of Columbia Circuit lacked jurisdiction over them with respect to the PIC issue raised here, however, because the PIC standard was established in the February 21, 1991, final rule, and was not reopened in the August 11, 1992, amendments. Their challenge to the PIC standard was therefore untimely, and they are barred from seeking further review here. However, because petitioner Cement Kiln Recycling Coalition filed a timely petition

challenges to the BIF Rule and its amendments in one proceeding. The court generally upheld the BIF Rule, including the Tier I and Tier II PIC standards, and vacated and remanded only the Tier III standard.

The court vacated the Tier III standard because it "was promulgated without adequate notice and comment, and because the disputed rule lacks an adequate basis in the rulemaking record." Pet. App. 9a; see *id.* at 41a-46a. The court held that although "EPA proposed individual elements of the Tier III standard separately, the component parts were never collected together in such a fashion as to enable the parties to anticipate and adequately comment on the ultimate Tier III standard." *Id.* at 43a. Specifically, "[n]owhere in the proposed rulemakings * * * does the agency indicate it is contemplating the possibility of dual CO and THC baselines." *Ibid.* With respect to Tier I and Tier II, in contrast, the court held that "[n]otice of these two standards was exhaustive." *Id.* at 44a. Indeed, the court noted, petitioners "do not contend that they were provided with inadequate notice or opportunity for comment on the Tier I and Tier II standards." *Id.* at 47a.

The court also held that "the EPA's action in promulgating the Tier III standard was arbitrary and capricious." Pet. App. 46a. Petitioners had contended that "the EPA articulated no basis for its conclusion that kilns could reliably quantify both CO and THC baselines when burning non-hazardous fuel." *Id.* at 45a. The court agreed, concluding that EPA "had no information on this issue and was relying on pure speculation when it decided that a standard of no

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challenging the February 1991 final rule, the court of appeals properly reviewed the PIC standards, and its decision is subject to this Court's review.

increase of CO and THC over quantifiable CO and THC baselines was achievable." *Id.* at 46a.

The court concluded that "even though we have vacated the Tier III standard, wet process kilns remain subject to the first two." Pet. App. 47a. The court rejected the contention that Tiers I and II are "fundamentally irrational" as applied to wet kilns. *Ibid.* The fact that wet kilns might be unable to comply with either Tier I or II did not render those regulations arbitrary and capricious. Rather, the court concluded, "[t]he EPA issued those regulations as protective of human health and the environment; and if it is technologically impossible for wet process kilns to meet them, they can simply stop using hazardous waste as fuel." *Id.* at 48a. The court did, however, suggest that EPA "may * * * wish to consider establishing an interim replacement standard for Tier III under the 'good cause' exemption of 5 U.S.C. § 553(b)(3)(B) pending full notice and opportunity for comment." *Id.* at 49a.

ARGUMENT

Petitioners challenge the court of appeals' decision to vacate and remand only that portion of the regulations for which it determined EPA lacked a reasonable basis and failed to provide adequate public notice and comment. Petitioners now contend that the court of appeals also should have stayed application to them of regulations that it determined had an adequate record basis and were properly promulgated. The court of appeals properly limited the remedy to the violation it found, and its decision does not warrant further review.

1. Petitioners failed to raise on appeal the question they now present in their petition that the Tier I and II standards, at least as applied to them, cannot be severed from Tier III and should be stayed. This question was

not passed upon by the court of appeals. It was raised for the first time in the petition for rehearing, which the court of appeals denied without explanation. Pet App. 197a. Petitioners' severance argument accordingly has been waived. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Keating* v. *Federal Energy Regulatory Comm'n*, 927 F.2d 616, 625-626 (D.C. Cir. 1991). Petitioners present no reason for disregarding this rule in their case.

2. Petitioners contend that the Court should grant review in this case in order to clarify the standard governing the severability of invalidated regulatory provisions. Pet. i, 16-26. That issue is not, however, presented by this case.

a. Petitioners' requested relief renders their own severability argument irrelevant. Petitioners contend that the court of appeals erred, in light of its remand of Tier III, by failing to stay the application to them of the Tier I and Tier II standards. Pet. 29-30. Petitioners urge that severability of regulations should be analyzed differently from severability of statutory provisions on the ground that piecemeal remand impermissibly intrudes on regulatory prerogatives. Pet. 4, 29. Petitioners do not, however, ask that all three PIC emissions standards be remanded as a unit. They acknowledge that the Tier I and II regulations should remain in effect, because "a broad remand would thwart EPA's intent" to continue to regulate other hazardous waste treatment facilities under the Tier I and II standards. Pet. 29. Petitioners instead assert that, while those standards should not have been remanded together with Tier III, they should have been stayed as to them only. The stay petitioners seek is thus admittedly consistent with a determination that Tier III is severable.

The propriety of declining to stay Tiers I and II turns not on whether Tier III was severable, but on whether the court of appeals properly exercised its equitable discretion in fashioning a remedy. See *Schurz Communications, Inc.* v. *FCC*, 982 F.2d 1043, 1056 (7th Cir. 1992). Petitioners suggest that the court was required to leave wholly unregulated the PIC emissions from petitioners' burning of hazardous-waste fuel while EPA develops a substitute for the invalid Tier III standard. The court of appeals acted well within its discretion, however, in determining that regulation under Tiers I and II during the interim period better reflected EPA's intent than no regulation, even if petitioners were thereby temporarily prevented from burning hazardous wastes without modification of their facilities and processes. Pet. App. 48a-49a. That equitable, fact-specific determination warrants no further review.[7]

b. Under any test, EPA's Tier III PIC standard is plainly severable from the remainder of the rule. Petitioners unsuccessfully challenged in the court of appeals the application of the Tier I and II standards to their wet kilns as arbitrary and capricious in the absence of Tier III, Pet. App. 47a, and they do not pursue that challenge here, Pet. i. Accepting that Tiers I and II are not arbitrary without Tier III, there is no basis to doubt that EPA would have adopted the Tier I and II PIC controls even in the absence of Tier III. The invalidity of Tier III does not undermine EPA's intent to impose PIC

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[7] The relief granted by the court of appeals is consistent with the principle that judicial "intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible." *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 813 (9th Cir. 1980).

controls on boilers and industrial furnaces burning hazardous wastes. As petitioners admit, Tier III is "utterly irrelevant" to many of the facilities regulated by the BIF Rule. Pet. 29.

EPA regards Tier III as severable, and accordingly believes that the relief granted by the court of appeals does not improperly intrude upon the agency's administrative function. As the court of appeals pointed out, its remand of Tier III leaves within EPA's discretion whether petitioners should remain subject to Tiers I and II, or whether, pending notice and comment on a final Tier III substitute, those standards should be waived or modified for wet process kilns under the "good cause" exemption of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(B). Petitioners nonetheless contend, in effect, that the court of appeals would have better honored EPA's intent if, instead of leaving to EPA to decide what action to take with respect to petitioners, the court itself had stayed Tiers I and II. That is an argument for judicial intrusion into, rather than respect for, the agency's administrative responsibilities.

3. Even if a severability question were presented here, petitioners have not shown that the standard for determining the severability of invalid portions of administrative regulations is an unsettled issue of general importance. Petitioners posit a tension between the "presumptive severability" standard in *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 294 (1988), and the "substantial doubt" test articulated by then-Judge Scalia in *North Carolina* v. *Federal Energy Regulatory Comm'n*, 730 F.2d 790, 796 (D.C. Cir. 1984). See Pet. 22-26. Any alleged inconsistency between these standards is illusory.

The Court in *K Mart*, like the District of Columbia Circuit in this case, was guided by the agency's intent in

holding that one invalid provision creating an exemption from the general regulatory scheme could be severed where there was "no indication that the regulation would not have been passed but for its inclusion." 486 U.S. at 294. *North Carolina*, like other decisions upon which petitioners principally rely, reviewed an administrative order disposing of an individual dispute, rather than a set of agency regulations of general applicability.[8] The court's conclusion in that context that the agency would not have "adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted," 730 F.2d at 796, was a fact-bound application of basically the same general standard applied in *K Mart*.

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), is also consistent with *K Mart*. *Addison* addressed the propriety of remanding a single regulatory

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[8] The court in *North Carolina* reviewed FERC's order memorializing a negotiated settlement with a major pipeline operator and invalidated it in part. Because the Commission had repeatedly stated that the settlement was "a package," "comprehensive," and an "overall settlement," with the invalidated portions "not severable" from the aspect proposed to be left in place, the court held that the Commission's own statements created substantial doubt whether FERC would have settled the dispute on the same terms in the absence of the invalidated portion of the settlement, and so remanded it in full. 730 F.2d at 796. See also *NLRB* v. *Food Store Employees Union*, 417 U.S. 1, 10 (1974) (holding that, where NLRB order appeared improperly to exclude award of expenses to union that successfully challenged employer's flagrant and extensive NLRA violations, "remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course"); *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) (holding that, where FPC order granted a permit with specified conditions and the court invalidated the conditions only, the court "usurped an administrative function" when it granted the permit without the conditions instead of remanding).

definition of a statutory term when one aspect of the definition was invalidated. The court determined in that case that it should not "write a definition," 322 U.S. at 619, but should defer to the agency to do so. *Addison*, too, is thus consistent with the courts' uniform approach of respecting regulatory prerogatives in fashioning remedies. Determinations of non-severability where severance would carve into a discrete regulatory unit such as a single regulatory definition, as in *Addison*, or an order or settlement in a particular case, as in *North Carolina*, *Food Store Employees Union*, and *Idaho Power Co.*, create no conflict, but are merely fact-bound applications of the settled general rule.

The absence of genuine conflict in this Court's cases is reinforced by the lack of conflict in the lower courts. Apart from the decision below, the only lower court decision petitioners cite as creating a conflict is *Alliance for Community Media* v. *FCC*, 10 F.3d 812 (D.C. Cir. 1993). See Pet. 23. That case, a First Amendment challenge to FCC's order regulating indecent cable programming, presented the distinct issue of invalidation of the order leaving in place "selective regulation," which itself "could * * * run afoul of the First Amendment." 10 F.3d at 831. The court thus remanded "for reconsideration of the under-inclusiveness of the remaining regulatory scheme." *Ibid.* That opinion, moreover, has been vacated pending rehearing en banc, 15 F.3d 186 (D.C. Cir. 1994), and the full court of appeals will have an opportunity to correct any error or conflict with its own decision in this case that it may identify.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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